Date: August 1, 1996
CASE NO.: 96-CAA-1

In the Matter of

DWAYNE OLSOVSKY,
Complainant

v.

SHELL WESTERN E&P, INC.
Respondent

APPEARANCES:

Michael D. Seale, Esq.
For the Complainant

George P. Parker, Jr., Esq.
Victoria M. Garcia, Esq.
For the Respondent

BEFORE: C. RICHARD AVERY
Administrative Law Judge

RECOMMENDED DECISION & ORDER

Background

These proceedings arise under the employee protection provisions of the Clean Air Act, 42 U.S.C. § 7622 ("CAA"), the Water Pollution Control Act, 33 U.S.C. § 1367 ("WPCA"), the Toxic Substances Control Act, 15 U.S.C. § 2622 ("TSCA"), the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610 ("CERCLA"), and the Solid Waste Disposal Act, 42 U.S.C. § 6971 ("SWDA") (collectively referred to herein as "the Acts"). Complainant Dwayne Olsovsky ("Olsovsky" or "Complainant") filed a Complaint with the Department of Labor on or about September 8, 1995, alleging that he was a protected employee who had engaged

in protected activity within the scope of the Acts and was discharged by Respondent as a result of that activity.

An investigation was conducted by the Dallas, Texas Office of the Occupational Safety and Health Administration. In a letter dated October 6, 1995, the Regional Supervisor dismissed Olsovsky's Complaint because the 30-day allowable time period prescribed by the Acts expired before they could reach a determination on the merits of Olsovsky's allegations.

On October 11, 1995, Complainant appealed the initial determination of the Regional Supervisor. The matter was docketed in the Office of Administrative Law Judges and assigned to me on October 16, 1995, and on that same date, an Order was issued setting the case for trial on October 30, 1995. Thereafter, however, by agreement of both counsel, the case was reset for May 15, 1996. Both parties have waived the usual time restrictions in a case of this nature.[1]

A formal hearing was held in this matter on May 15-18, 1996, in Houston, Texas, at which time the parties were afforded full opportunity to present evidence and argument. The parties sought and were granted until July 15, 1996 to submit proposed findings of fact and conclusions of law, and, if they so desired, post-hearing briefs. The findings and conclusions in this Decision are based upon observations of the witnesses who testified, and an analysis of the entire record, arguments of the parties, applicable regulations, statutes and case law precedent.[2]

Exhibits and Stipulations

The exhibits in this case consist of 7 administrative exhibits, 33 Complainant's exhibits, and 103 Respondent'sexhibits. At the outset of the hearing, the parties stipulated that (1) Respondent's Houston Central facility is subject to the CAA and WPCA and that Complainant fell under any protection provided by those acts, assuming all other requirements are met, and (2) all alleged complaints giving rise to this action were internal complaints and that no governmental organ was informed of those alleged complaints prior to Complainant's termination.[3] Tr. 9-10. In its post-hearing submission, Respondent

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[1] Warren Botard joined Olsovsky in the original Complaint Letter dated September 7, 1995, and contended that he had been denied a promotion in retaliation for engaging in protected activity. The Regional Supervisor dismissed Botard's Complaint as untimely because the last incident which he perceived to be discrimination occurred more than 30 days prior to his filing the Complaint. I dismissed Botard's Complaint by summary decision entered April 24, 1996. Accordingly, Botard's Complaint is no longer part of this proceeding.

[2] The conclusions that follow are in part those proposed by the parties in their post-hearing proposed findings of fact, conclusions of law and order, and where I agreed with the summations, I adopted the statements rather than rephrasing the sentences.

[3] Respondent asserted that Complainant's alleged internal complaints were not protected under the statutes involved in this proceeding, thus depriving the Department of Labor of jurisdiction. Respondent's argument is based on the decision in *Brown & Root, Inc. v. Donovan,*

advised that for purposes of this proceeding, it does not contest the applicability of the TSCA, CERCLA, or the SWDA to its Houston Central facility or that Complainant fell under any protection provided by those acts, assuming all other requirements are met.

Issues

The following are the unresolved issues in this matter:

1. Whether the Complainant engaged in protected activity under the Acts;

2. Whether the Respondent knew or had knowledge that the Complainant engaged in protected activity;

3. Whether the actions taken against Complainant were motivated, at least in part, by Complainant's engagement in protected activity (*i.e.*, would Complainant have been discharged "but for" his alleged protected activity);

4. What damages, if any, the Complainant is entitled to as a result of the alleged retaliatory actions taken by Respondent; and

5. Whether Respondent should be awarded its costs in this proceeding.[4]

Findings of Fact

1. Complainant was hired by Respondent on December 29, 1989, to work at its Houston Central gas processing facility. Tr. 17-18. He was subsequently promoted to Maintenance Assistant B and then to Maintenance Assistant A. Tr. 26. Until early 1993, Complainant spent a majority of his time working on the caliper program on a computer in an office. Tr. 20-21, 911. In early 1993, he began working in the plant performing maintenance work, where he had more involvement with other maintenance personnel. Tr. 779-80.

2. Complainant's first review for 1990 was good and complimented him for making a safety suggestion. Tr. 106-09; RX-17, 4th page. However, performance problems surfaced in Complainant's 1991 review, which stated that "[h]e has a tendency at times to get in a hurry to perform a job," "[h]e needs to put more thought and planning into his work," and he "needs to devote more time to getting familiar with job policies and

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747 F.2d 1029 (5th Cir. 1984). I previously denied Respondent's Motion for Summary Decision on this point, based on the Secretary of Labor's pronouncements in other decisions issued subsequent to the *Brown & Root* decision.

[4] In its prehearing submission, Respondent listed as an issue whether it should recover its attorney's fees. In its post-hearing submission, Respondent dropped its request for attorney's fees, and instead only seeks to recover its costs.

procedures." RX-18 pp. 4, 6. The review summarized the performance discussion with Complainant as follows:

> Discussed in detail with Dwayne was safety. In particular was the need for Dwayne to put more thought and planning into his work. Analyze the job to be done, recognize potential hazards and anticipate possible problems. Get familiar with and follow all job policies and procedures. Participate and support the STOP program. By following the above Dwayne can eliminate all exposures for himself and his peers.

RX-18 p. 7.[5] The review also recited that "Dwayne stated his goal was to put more thought and planning into his work. To avoid injury to himself and his peers." *Id.*

3. Complainant's review for 1992 reflects further job-related problems, including being "disruptive at times" and having "a tendency to interject his thoughts before being asked." RX-19 p. 5. The performance discussion summary also states that Complainant "[m]ust assume a more active role in STOP by conducting daily, weekly observation tours, submit observation cards." *Id.* at 7.

4. Complainant's performance problems became more pronounced in his 1993 review. *E.g.*, "Dwayne's biggest problem is that he gets into a big hurry to do his job sometimes," "[m]ost of [his] peers do not want to work with him because they say he takes to[o] many chances and they have to spend too much time watching him," "[h]e has caused conflict in this area by getting upset & creating confusion with the work group," "Dwayne has a tendency to disrupt the work group with his attitude, display of anger and criticism of others." RX-20 pp. 4, 5. The review includes memoranda outlining altercations Complainant had with other employees, *id.* at 12-14, and lists the following "plans and goals":

> (1) Support the STOP program by being more pro-active in this area.
>
> (2) Spend more time planning a job, use of correct tools and equipment for the job.
>
> (3) Communicate to the work group your desires to control your temper, avoid unwarranted criticism, your desire to change your attitude and work as a Team Member. I have told Dwayne that I will be monitoring his progress. [*Id.* at 7]

5. On March 22, 1995, Complainant engaged in disruptive conduct at a maintenance team meeting. Tr. 202-03, 418-19, 518, 527-28, 913-14. Specifically, he verbally attacked a maintenance leader, Terry Raabe, because Raabe was sending turbines to an outside contractor for repairs. *Id.* The incident was fully investigated by Scott Nielsen

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[5] The S.T.O.P. program is "a safety oriented program," where employees can write a card when they see someone doing something that is unsafe or where they are doing something safely. Tr. 213-14.

(a Human Resources representative), John Sefcik (Houston Central's plant foreman), and Ken Deshotel (Houston Central's maintenance foreman). Over a period of two days, Nielsen, Sefcik, and Deshotel conducted separate interviews with Raabe, Complainant, and three other maintenance employees who had attended the meeting. Tr. 605-06, 661-62, 798-801. The three other employees corroborated the fact that Complainant had verbally attacked Raabe and was disruptive, and they remarked that Complainant was "hot-headed" and a "know-it-all"; they also stated that Complainant sometimes hurries to get his work done and that this raises safety concerns. Tr. 528, 605-08, 660-77, 801-02; RX-21 pp. 5-7. Following the investigation, Nielsen reviewed past precedents to ensure that any disciplinary action taken against Complainant would be consistent with discipline in other cases. Tr. 676. Consequently, the decision was made to suspend Complainant for two days without pay. Tr. 609, 677. On April 17, 1995, Complainant was given a memorandum advising him of his suspension and stating that "[c]ontinued unacceptable behavior and performance will lead to further disciplinary action, up to and including termination." Tr. 611; RX-23. Following the suspension, Complainant prepared an action plan to address the problems he was experiencing. Tr. 613; RX-24.

6. According to Complainant, he is not aware of any facts suggesting that his two-day suspension was the result of any alleged safety or environmental complaints he made. Tr. 203-04. Nielsen, Sefcik, and Deshotel all confirmed in their testimony that the suspension was performance-related and that safety or environmental complaints were in no way related to the decision to suspend Complainant. Tr. 614, 677, 802.

7. On June 6, 1995, Deshotel prepared Complainant's review for the period January 1994 through April 1995. RX-25. This review noted Complainant's continued disruptive attitude (*e.g.*, he "continues to disrupt the work group with his attitude, display of anger and criticism," *id.* at 5), and gave him an overall assessment of "fails to meet normal performance expectations." *Id.* at 6. Memoranda reflecting specific performance-related incidents since his 1993 review were attached. *Id.* at 9-20.

8. The incident that directly precipitated Complainant's discharge occurred on July 10, 1995. On that date, Complainant was responsible for replacing a valve inside a compressor. Tr. 113. Two contract employees (Vic Tomasek and James Simicek) were assigned to assist him. Tr. 116. Complainant was responsible for the safety of Vic and James and for ensuring that Respondent's maintenance procedures were followed and were performed safely. Tr. 169-71. Under Respondent's policy, Complainant was also responsible for ensuring that Vic and James signed the required safe work permit[6] for the job, thereby confirming that they had read it. Tr. 174. In addition, Complainant was responsible for doing lockout/tagout on the compressor (Tr. 393-94, 489, 511-12, 721); however, he failed to perform lockout/tagout on this occasion (Tr. 178-79).

9. In order to replace the valve within the compressor, Complainant had to remove a metal cap. Tr. 167-68. This is considered a dangerous part of the procedure because trapped pressure within the compressor could cause the cap (which weighs

[6] A safe work permit lists the procedures to be followed in order to ensure that the job is performed properly and safely. Tr. 173.

42 pounds) to blow off. Tr. 171-73, 394-95, 810. A blown cap could kill a person. Tr. 172-73, 193. To guard against trapped pressure, therefore, one must check the bleeder (Koenig) valves to ensure that they are open, and leave the nuts on two of the six bolts holding the cap on the compressor. Tr. 394. The cap is pried loose before removing the last nuts, so that trapped pressure can escape. *Id.* On July 10, 1995, all six nuts had been removed, and when Complainant pried on the cap, it blew off and struck James Simicek in the lip. Tr. 116-17; RX-99 Tab 5 pp. 543-45. According to Complainant, "[i]t cut [James] pretty bad" and could possibly have killed him if it had hit him in the right place. RX-99 Tab A p. 545.

10. Following that accident, an investigation was made by Deshotel and Tom Hester (the Health, Safety & Environmental Specialist at Respondent's Houston Central facility). Tr. 804. Respondent's safety team also investigated the accident and prepared a written report, which was provided to Bob Bonilla, the Plant Staff Supervisor at Houston Central, who had replaced Sefcik. Tr. 710, 714-15; RX-106. Additionally, Bonilla conducted his own investigation. Tr. 712-13. Based on the information from the investigations, Bonilla concluded that the accident was the result of unsafe acts and unsafe behavior of the Complainant. Tr. 717. On July 18, 1995, Bonilla and Deshotel met with Complainant for more than two hours to discuss Complainant's performance relating to the July 10 accident. Tr. 717-18. At the end of the meeting, Bonilla told Complainant that his conduct illustrated that he was a risk taker and that the July 10 accident resulted from poor safety performance on Complainant's part. Tr. 723. Bonilla told Complainant that what he had heard from Complainant at the meeting would be evaluated to help them determine what appropriate corrective action to take. Tr. 724.

11. On August 4, 1995, Bonilla, Deshotel, Nielsen, and Bob Ordemann (Bonilla's manager) met for most of the day to discuss Complainant's performance and determine what corrective action would be appropriate and prepared flip charts to assist in their deliberations. Tr. 680-81, 729-33, 761-63, 811-12; RX-34. During the meeting, they discussed and analyzed in detail Complainant's performance on July 10 that led to the accident, as well as his prior performance record. *Id.* Nielsen provided information regarding discipline assessed by Respondent in other situations to ensure that any discipline taken against Complainant was consistent with disciplinary actions taken by Respondent against other employees. Tr. 735. Bonilla, Deshotel, Ordemann, and Nielsen did not reach a final decision regarding Complainant's discipline on August 4; rather, the meeting was recessed for the weekend so that the group could consider whether Complainant should be discharged or given a suspension and demotion. Tr. 689, 736, 761-62, 811-12. On Monday, August 7, 1995, Bonilla, Nielsen, Deshotel, and Ordemann unanimously reached the conclusion that Complainant should be discharged. Tr. 689-90, 736-37, 762, 813. The reason for their decision was Complainant's unsafe conduct on July 10, coupled with his overall prior work record. Tr. 691-92, 712, 738-39, 764-65, 813. Accordingly, on August 9, 1995, Complainant was advised that he was being discharged, effective that date. Tr. 738.

12. On August 14, 1995, Complainant applied for unemployment benefits with the Texas Employment Commission and signed a statement with that agency in which he claimed that he was discharged "due to hearing loss got bad evaluations for last 2 yrs.[,] had first aid accident with contractor[,] lead [sic] to discharge." RX-38. Complainant did not list whistleblowing as the cause of his discharge. Although at the hearing in this case,

Complainant testified that he merely put down the reason Respondent gave him for his discharge on his claim for unemployment benefits (Tr. 157-59), it is undisputed that hearing loss was not one of the reasons given for his discharge (Tr. 154).

13. By letter dated September 7, 1995 (RX-1), Complainant filed his complaint with the Department of Labor in which he alleged that Respondent discharged him for making safety and environmental complaints.

14. On October 12, 1995 (six days after the Regional Supervisor dismissed his whistleblower Complaint) Complainant filed a charge with the Equal Employment Opportunity Commission in which he alleged under oath that he was discharged in retaliation for making complaints that he had been sexually harassed by a Lead Operator. RX-41 pp. 2-5 ("Ultimately, complainant believes that he was terminated due to the totality and culmination of his complaints against [the lead operator], and that complainant was retaliated against for making the complaints"). Complainant also claimed that he "ultimately believes that he was fired because of Shell's intolerance to his hearing disability and because Shell refused to make reasonable accommodations to complainant for his hearing loss, such as providing hearing aids or other hearing enhancement." *Id.* at 3. No reference was made to alleged whistleblowing in his charge to the EEOC.

15. Complainant's letter of September 7, 1995 lists twelve items that he or Warren Botard allegedly complained about, which they claimed resulted in adverse action against them. ALJ-1. Complainant Olsovsky testified at the hearing that eleven of these twelve items are his and that one item (Item No. 8) was Botard's alone. Tr. 95. Complainant also testified that all complaints made by him occurred after 1992. Tr. 217.

16. The evidence adduced at the hearing shows that during times relevant to this case, Respondent had in place a number of programs that demonstrate commitment to safety and environmental issues. Regular monthly safety meetings were held during which employees could raise safety or environmental concerns. Tr. 206-07, 596. At each of these meetings, a safety or environmental issue was presented as the main part of the program. Tr. 207, 597; RX-86-98. The safety meetings were videotaped so that employees who were on a different shift could view the videotape at their leisure. Tr. 213. One videotape introduced as an exhibit at the hearing included a training program on spill prevention and focussed on the cardinal rule of "thou shalt not spill." RX-93, counter: 13:30. Another videotape, of a safety meeting held on December 7, 1993, includes a segment where Sefcik encouraged employees to bring forth problems. RX-89, counter: 56:30. It is undisputed that at the safety meetings, employees reported on "near misses" and that employees were encouraged to fill out STOP cards when they saw another employee doing something wrong. Tr. 211-14, 598-99, 978-79. In addition, Respondent's Code of Conduct, Employee Handbook, and bulletin board notice encouraged employees to report safety and environmental issues. RX-3, RX-4, RX-6, & RX-7. Virtually every witness testified that Houston Central management had a reputation for commitment to safety and environmental matters. Tr. 367, 374, 389-90, 421-23, 441-42, 461, 477, 483-86, 502, 523, 536, 603-04, 817, 921-22, 933-34.

17. Four of the five people to whom Complainant allegedly complained (Ulrich, Sefcik, Archuletta, and Raabe) denied that he had made any complaints to them. Tr. 482-83, 614-15, 914, 937. Deshotel, the fifth person to whom Complainant allegedly complained,

testified that he had no recollection of Complainant making any complaints tohim, and if he had complained, the matter would have been addressed. Tr. 826-27. Furthermore, even though it is undisputed that Complainant was an outspoken person (Tr. 460-61, 982), 11 of the co-workers (aside from Botard and Mardick) who appeared as witnesses, and who were questioned on the subject, all testified that they had never heard Complainant raise any safety or environmental complaints. Tr. 366-67, 374, 393, 426, 444-45, 462, 477, 482-83, 504-05, 525, 538-39. In addition, even though Respondent had regular monthly safety meetings at which safety or environmental issues could be raised, Complainant testified that he never took advantage of this opportunity to voice his complaints. Tr. 212.

18. Despite the fact, however, that I do not find corroborating evidence that Complainant made all of the twelve complaints listed in ALJ exhibit 1, I do find that based on the testimonies of Botard and Mardick that at least certain of Complainant's concerns were most likely voiced to his supervisors subsequent to 1992. Specifically, I accept Warren Botard's testimony that Complainant commented to Mr. Deshotel about the buried chemical waste, including paints, in a corner of the processing facility (Item 1),although I note Mr. Deshotel and others knew this well before any such observations were made by Complainant. Also, supported by Botard's testimony, I find Complainant voiced concern about instructions to close all relief valves and flare valves (Item 5). While Archuletta and Sefcik denied such conversations, Mr. Deshotel only stated he did not recall safety complaints. As to Karl Mardick's testimony, aside from the Complainant the only witness who is no longer employed by Respondent, he too supported Complainant's testimony that concerns were stated to Terri Raabe about Boilers being drained on the ground (Item 7); leakage from the sponge oil system (Item 9) and breathing vapors from working inside the cooling tower (Item 10). Therefore given the weight of the evidence I find Complainant made comments to supervisors about at least these five items.

19. Notwithstanding these comments, however, I find that safety and/or environmental complaints or concerns on Complainant's part were not a factor in Complainant's discharge. In other words, I find that any protected behavior Complainant may have engaged in was not the reason for his termination. Each person involved in the decision to terminate Complainant described in detail how the four (Nelson, Ordemann, Bonilla and Deshotel) agonized over the decision and arrived at it because of the July 10, 1995 accident and Complainant's past job performance. Each swore safety or environmental concerns, if made, were never a subject of their meeting and there is no evidence in the record to infer otherwise.

Conclusions of Law

In a case such as this, the burden is on the Complainant to prove by a preponderance of the evidence that retaliation for protected behavior was a motivating factor in his termination. First, the complainant must "make a *prima facie* showing that protected activity motivated Respondent's decision to take an adverse employment action." *West v. Systems Applications Int'l*, No. 94-CAA-15 at 5 (Secy. Apr. 19, 1995). "[T]o establish a *prima facie* case, a Complainant must show that: (1) he engaged in protected conduct; (2) the employer was aware of that conduct; and (3) the employer took some adverse action against him." *Id.* at 5. In addition, he (4) "must present evidence sufficient to raise the inference that the

protected activity was the likely reason for the adverse action." *Id.* at 6. *Accord Dartey v. Zack Co.*, No. 82-ERA-2 at 7-8 (Secy. Apr. 25, 1983). The respondent "may rebut [the] showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. Complainant must then establish that the reason proffered by Respondent was pretextual." *West* at 5. As emphasized in *Crosier v. Westinghouse Hanford Co.*, 92-CAA-03 (Secy. Jan. 12, 1994), a complainant's burden of proof in a whistleblower action is formidable:

> The complainant has the ultimate burden of persuading that the legitimate reason articulated by the respondent was a pretext for discrimination, either by showing that the unlawful reason more likely motivated it or by showing that the proffered explanation is unworthy of credence. At all times, the complainant has the burden of showing that the real reason for the adverse action was discriminatory.

Id. at 7 (citation omitted).[7]

Prima Facie Case.

It is my finding that Complainant has satisfied the first element of his prima facie case burden by showing that he engaged in protected activity. As explained in the findings of fact, and based on the record, I have found that Complainant did, after 1992, make at least some of the complaints asserted in his Complaint Letter of September 7, 1995, to his supervisors.

I also find that at least some of the complaints constitute protected activity. In order to be protected activity, "an employee's complaints must be 'grounded in conditions constituting reasonably perceived violations' of the environmental acts," and the employee must, therefore, "have a reasonable perception that [the employer] was violating or about to violate the environmental acts." *Crosby v. Hughes Aircraft Co.*, No. 85-TSC-02 at p. 14 (Secy. 1993). *Accord Abu-Hjeli v. Potomac Elec. Power Co.*, No. 89-WPC-01 at p. 6 (Secy. 1993) (employee must demonstrate "reasonably perceived violation of the underlying statute or its regulations"). Furthermore, while "complaints regarding effects on public safety or health" are protected, "those related only to occupational safety and health are not." *Aurich v. Consolidated Edison Co.*, No. 86-CAA-2 at p. 4 (Secy. Apr. 23, 1987) (finding safety complaints about airborne asbestos as an occupational hazard were not covered by the CAA employee protective provision). *Accord Decresci v. Lukens Steel Co.*, No. 87-ERA-13 at p. 5 (Secy. Dec. 16, 1993).

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[7] The Secretary follows the evidentiary standards prescribed by the United States Supreme Court for federal discrimination lawsuits. For example, in *Dartey*, the Secretary followed the burdens of proof in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and specifically held that "the initial stages of proof in an intentional discrimination case under Title VII of the Civil Rights Act of 1964 . . . [are] equally applicable to cases arising under 29 CFR Part 24." *Dartey* at 7. Similarly, in the *West* case, the Secretary cited the decision in *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993), in support of the required evidentiary showing in a whistleblower case. *West* at 5.

In this instance, while Complainant testified that he was uncertain whether a state or federal law had been violated, at least to the burial of waste material and run offs and leakage of oil and other spillage on the ground and in surface water, I find Complainant's concerns were rooted in the reasonable belief that public health and safety were at risk. A good faith and reasonable belief that there is a problem is all that is required to amount to protected behavior under the Act, and I find Complainant has demonstrated that belief at least to some items listed on ALJ exhibit 1.

The third element of a prima facie is that an adverse action take place. Because Complainant was terminated, he satisfies this element.

As the fourth element of the prima facie case, Complainant must establish that his discharge was more likely than not the result of the alleged protected activity. To satisfy this test, Complainant must show "a causal connection between the protected activity and the adverse employment decision" -- *i.e.*, "causation-in-fact or 'but for' causation." *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 43 (5th Cir. 1992). Complainant has failed in this burden.

The evidence undermines any claim of causation. According to Complainant, almost all of his alleged complaints were made in 1993 or 1994, many months before his discharge. Tr. 71, 75, 79, 82, 89, 92, 96, 97, 100; RX-1. Furthermore, according to Complainant's testimony, he complained about four items to Deshotel (the only decision maker to whom he complained), and three of those alleged complaints occurred in early 1993 and the fourth occurred in 1994. Tr. 79, 89, 96, 97. Thus, all of the complaints allegedly made to Deshotel occurred long before Complainant's discharge, and this time lapse impugns any claim of causation. *See Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994) (although a ten-month time lapse "is, by itself, insufficient to prove there was no retaliation, in the context of this case it does not support an inference of retaliation, and rather, suggests that a retaliatory motive was highly unlikely.") (footnote omitted). *West*, *supra* at 9 (inference of causation exists where discharge occurred 30 days after complaint). In addition, it is undisputed that Complainant's performance problems began in 1991 and became more pronounced in 1992, which was **before** Complainant allegedly made any complaints. Moreover, it is undisputed that the July 10, 1995 accident actually occurred and that Complainant was at fault. Indeed, one of the witnesses Complainant called at the hearing credibly testified that Complainant told him that he had "f _ _ _ ed up." Tr. 446.

Other evidence negating any causal connection include the fact that (1) Complainant was suspended without pay for disruptive behavior at a meeting only three months before his discharge and he was told at that time that continued unacceptable behavior and performance would lead to further disciplinary action up to and including termination (RX-23). (Complainant admits that the suspension had nothing to do with safety or environmental complaints) (Tr. 203-04); (2) Complainant's own witnesses testified that Respondent's management at Houston Central was conscientious when it came to safety and environmental matters, and in fact, Mardick testified that Deshotel was "very safe -- proactive in the safety area." Tr. 1042; and (3) almost immediately after receiving notice that the Secretary had dismissed his whistleblower complaint, Complainant filed an EEOC Charge in which he swore under oath that his discharge was for completely different reasons.

Lastly, even if Complainant established a prima facie case, Respondent articulated legitimate, nondiscriminatory reasons for Complainant's discharge. Specifically, all four decision makers (Deshotel, Nielsen, Ordemann, and Bonilla) testified that Complainant was discharged due to his unsafe acts on July 10, 1995, coupled with his prior unsatisfactory work record. Furthermore, there is documentary evidence in the record reflecting that these were the reasons for Complainant's discharge and that he in fact had an unsatisfactory prior work record, and Complainant has failed to show this not to be the real reason for his discharge.

The evidentiary considerations discussed previously negate the existence of pretext. Indeed, a search of the record does not produce evidence that would point toward a finding of pretext. Complainant gave general testimony about other Houston Central employees who were involved in injuries or accidents and who were not discharged. However, most of those situations involved workers' compensation injuries, and none of them were shown to be even similar to Complainant's situation; nor was there any evidence that the individuals involved had prior unsatisfactory work records, as in Complainant's case. To rely on comparable situations, Complainant would have to show that "the misconduct for which [he] was discharged was **nearly identical** to that engaged in by" employees who did not engage in protected activity. *Davin v. Delta Air Lines, Inc.*, 678 F.2d 567, 570 (5th Cir. Unit B 1982) (emphasis added). *Accord Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995).

Complainant also called witnesses who testified generally that they had not had run-ins with Complainant and that his job performance was satisfactory or even good. This evidence is of no probative value because a co-worker's perception of a complainant's job performance is not relevant to whether the employer's actions were unlawfully discriminatory; rather, "[i]t is the perception of the decision maker which is relevant." *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 465 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987). I would note, however, that several of Complainant's co-workers testified that Complainant did have performance problems, and they reported that to Deshotel and Nielsen. Tr. 396-97, 420-21, 461, 482, 514, 668-72, 782-84, 911-12; RX-20 p. 4; RX-21 pp. 5-9. Furthermore, any testimony Complainant gave regarding his opinion concerning his job performance is not probative of pretext. *See, e.g.*, *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991) ("a dispute in the evidence concerning [plaintiff's] job performance does not provide a sufficient basis for a reasonable fact finder to infer that [the employer's]proffered justification is unworthy of credence"); *Bohrer v. Hanes Corp.*, 715 F.2d 213, 219 (5th Cir. 1983) (plaintiff's testimony that he adjudged his performance adequate was insufficient to establish pretext in age discrimination case), *cert. denied*, 465 U.S. 1026 (1984). *See also Houser v. Sears, Roebuck & Co.*, 627 F.2d 756, 759 (5th Cir. Unit A 1980).

Complainant's claim that his discharge was pretextual boils down to his subjective belief that he was discharged in retaliation for alleged protected activity. [8] Subjective belief

[8] While Complainant also pointed to a safety award and cash bonus he received in 1994, the evidence was that all employees received the same award if they worked five accident free years.

that discrimination has occurred not only will not establish a pretext, but has no evidentiary value. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc) ("It is more than well-settled that an employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion, in the face of proof showing an adequate nondiscriminatory reason.").

Conclusion

Based on the foregoing analysis, I conclude that Complainant has not established a prima facie case, that even if he did establish a prima facie case, Respondent has clearly produced evidence of a legitimate, nondiscriminatory reason for Complainant's termination, and that there is no evidence of pretext.

My perception of the Complainant, after spending many hours in trial and hearing from a great many witnesses, is that Complainant is a head strong young man who while being a good worker does not appear to like authority and on occasion worked too fast giving little heed to procedure. I do not doubt that Complainant was liked on a one on one basis by many of his co-workers, but neither do I doubt his aggressive behavior on projects caused some of these same people concern about working with Complainant. Neither do I doubt that it was Complainant's carelessness on July 10, 1995, that caused injury to a contract employee.

Conversely, I was impressed by the sincerity of the four men who met on August 4, 1995, to decide Complainant's fate following his July 10, 1995, accident. None of these four men had discharged anyone before and after meeting on Friday the 4th they deliberated separately over the weekend and then unanimously on Monday morning agreed that Complainant should be discharged. In sum, I find no hint that any prior complaints and/or observations about safety or the environment Complainant might have made were factors in his termination.

Respondent's Costs

Respondent concedes that neither the regulations nor any statute or executive order address a successful Respondents' right to recover costs. Notwithstanding this fact, Respondent here seeks costs (not attorney's fees) according to Rule 54(d)(1) and Rule 11 of the Federal Rules of Civil Procedure. I do not agree that Respondent is entitled to recover its costs. I do not find bad faith conduct on Complainant's behalf, and absent express statutory language each litigant must pay their own costs and attorney's fees.

RECOMMENDED ORDER AND DECISION

In other words, he had not been singled out for that award, and I do not find the award to support Complainant's charges of retaliation.

It is my recommendation that Respondent should prevail in this case and that Complainant's complaint should be **DISMISSED.**

SO ORDERED this ___ day of August, 1996, at Metairie, Louisiana.

_____
C. RICHARD AVERY
Administrative Law Judge

CRA:kw

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See Fed.Reg. 13250 (1990).